



June 4, 2015

Barbara Berenson, Esquire
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

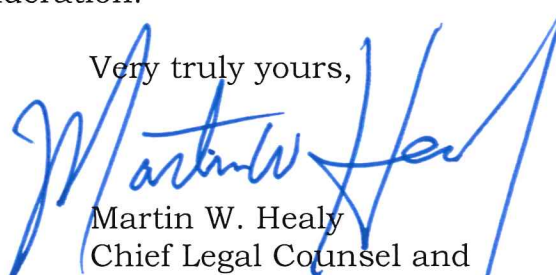
Re: **Proposed Amendments to the Code of Judicial Conduct**

Dear Attorney Berenson:

On behalf of the Massachusetts Bar Association, I write in support of the Proposed Code of Judicial Conduct. The Proposed Code was thoughtfully discussed and voted on by our Judicial Administration Section Council and unanimously endorsed by our House of Delegates on May 28, 2015. Additionally, several members of our Judicial Administration Section Council expressed concern over Proposed Rule 2.14, *Disability and Impairment*. I am attaching a summary of those concerns for your edification.

Thank you for your consideration.

Very truly yours,



Martin W. Healy
Chief Legal Counsel and
Chief Operating Officer

Enclosure

cc: Marsha V. Kazarosian, President
Michael Maroney, Chair, Judicial Administration Section
Lori Cianciulli, Vice-Chair, Judicial Administration Section

Memo

TO: Martin Healy, COO, MassBar and Marsha Kazarosian, President, MassBar
CC: Michael Maroney, Chair, Judicial Administration Council
FROM: Lori Cianciulli, Vice-Chair, Judicial Administration Council
RE: Proposed Code of Judicial Conduct
DATE: June 3, 2015

Dear Marty and Marsha,

As you know, the Judicial Administration Council was asked by the Hon. Cynthia Cohen to review the Proposed Code of Judicial Conduct, and comment on same. The council was honored to host Judge Cohen at our April meeting where she spoke about the proposed code and entertained questions and comments. The council again took this matter up at our May meeting and, after discussion, voted to support the Proposed Code of Judicial Conduct without reservation and to ask that the matter be placed on the May 28, 2015 HOD meeting to solicit support of the full HOD. The JAC proposal for support of the proposed code was presented and approved. Although the JAC support was unqualified, there were several members of the council, all attorneys, who expressed concern with proposed provision 2.14.

The proposed provision, as well as its comparison to the 2007 Model MBA Code, is stated below. These two excerpts came directly from materials on the court website, and were included in the materials circulated to the House of Delegates.

Below that is a summary of the concerns raised by some of the council members. One council member did take the time to write these concerns out and those comments are included in their entirety. Additionally I have summarized the comments and concerns of at least three other attorney members of the JAC. No judges on the council expressed any concerns about any of the provisions. Also, please note that the concerns expressed by the attorneys on the council relate only to the portion of the rule which deals with the circumstances under which judges are required to take action regarding an attorney. We are not addressing the circumstance where action is required regarding another judge, particularly as the judges expressed no concerns in regard to that provision.

PROPOSED RULE:

RULE 2.14

Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance

program.

COMMENT

[1] Taking appropriate action to address disability or impairment pursuant to this rule is part of a judge's judicial duties. Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action. See also Rule 2.15.

SUMMARY OF CHANGES PUBLISHED BY THE COURT

(language which raised concern of some committee members is emphasized below):

Rule 2.14 - Disability and Impairment

Comparison to 2007 Model Code

Rule 2.14 is adopted from the 2007 Model Code without modification. A new sentence is added to Comment [1] to make clear that it is part of a judge's judicial duties to take appropriate action to address the disability or impairment of a lawyer or another judge. Comment [2] is modified by deleting the last clause, as the reference to Rule 2.15 suffices.

Comparison to Current Code

This is a new Rule. It is designed to foster public confidence in the administration of justice by requiring judges to take appropriate action whenever the judge has a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol or by a mental, emotional, or physical condition. *Previously, the Code addressed impairment in Canon 3D and required judicial action only where the impairment had manifested itself in lack of diligence or competence, or was evidenced by the violation of an ethical rule raising a significant question about the judge's or lawyer's honesty, integrity, trustworthiness, or professional fitness.*

SUMMARY OF CONCERNS RAISED BY THREE MEMBERS OF THE JAC:

Concerns raised primarily center on the expansion of the judge's duty to take action. Specifically, the fact that the broadly termed "impairment" need not manifest itself in a lack of diligence, competence or ethics violation.

While it is understood that the goal is to intervene before there is a manifestation of lack of diligence or incompetence, some council members expressed the view that this enlargement of the judge's mandate is a slippery slope. The concern is not for the

situation of the obviously substance using/abusing attorney. The concerns expressed center around whether there is in fact “impairment” if there is no deleterious effect on the attorney’s work product or ethics.

Examples raised are the older practitioner, the practitioner going through a divorce or loss of a close loved one; the practitioner known to be treating for cancer and working through chemotherapy; the practitioner known to be in counseling for depression, etc. These all can broadly be seen as mental, emotion or physical impairments, but if they are not affecting the attorney’s performance, why is there an obligation to take action and what are the likely consequences of doing so for both the attorney and the client, to whom the attorney must report the referral/judicial action.

An additional concern raised in this regard is that the broadness of this requirement may lead to it being used as a litigation tool in certain cases (and certain types of litigation matters may be more likely to have this situation arise). One council member states he has seen situations where attorneys will attempt to gain a tactical advantage by either putting the judge in a situation where s/he may have to recuse themselves after instigating remedial action in a case, or the attorney may need to withdraw from the matter. This council member expressed concern that attorneys may disclose information regarding opposing council in pleadings in an attempt to instigate judicial action under this section, even though there is no lack of diligence or incompetence on the part of the purportedly “impaired” attorney.

For these reasons, the members expressing these concerns would respectfully urge that the requirements under this section are maintained, not broadened, such that the obligation to act occurs when the impairment manifests itself in a lack of diligence or competence, or an ethical violation.

CONCERNS RAISED AND DRAFTED BY A PARTICULAR MEMBER OF THE COUNCIL:

“My comment/concern goes to the new Rule 2.14 as it applies to mandating that Judges take action against a lawyer if they have a reasonable belief that the lawyer is impaired. There is a conflict that arises at the moment the Judge takes any such action and the Canons do not give any specific guidance to the Judge concerning recusal from that point forward in cases involving the attorney.

The following example, which is based upon my experience in representing an attorney who was the subject of a Judge’s BBO complaint to Bar Counsel pursuant to Canon 3(D)(2), illustrates these issues and why it would be helpful if the new Canons were to encourage Judges — who file Bar Counsel complaints or take action under the new Rule 2.14 —to recuse themselves from cases involving the attorney.

Example. Superior Court Judge presides over a trial and at the conclusion, based upon certain evidence, files a complaint with Bar Counsel against the defendant who is an attorney (not acting pro se but represented by counsel). Bar Counsel opens an investigation which is confidential (and will remain confidential indefinitely if no public discipline of the attorney results). During the pendency of the confidential Bar Counsel investigation, the attorney is representing a client in an independent case which is scheduled for trial (to begin imminently) in the Judge's session. The attorney brings an *ex parte* motion asking the Judge to recuse based upon the Judge's complaint against the attorney to Bar Counsel. The Judge denies the motion, stating that he/she has no personal bias or prejudice that requires recusal under Canon 3E and that the Judge filed the Bar Counsel complaint to discharge his/her judicial duties under Canon 3(D)(2). The Judge takes the position that he/she should not recuse where the only cited basis for doing so is a Judge's discharge of their official judicial duties. The attorney hires counsel who argues an *ex parte* motion for reconsideration of the Judge's denial of the *ex parte* motion to recuse. Based upon the following arguments, the Judge allowed the motion for reconsideration and recused without stating the basis for recusal in the public record. Ultimately Bar Counsel concluded the investigation initiated by the Judge without public discipline and the Judge's Bar Counsel complaint remains confidential as of today's date.

Arguments supporting recusal.

If the Judge does not recuse, Mass. R. Prof C. 1.4(b) arguably will require the attorney to disclose to his client that the Judge filed a Bar Counsel complaint against him as that rule requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The issue must be viewed from the client's point of view and not from the point of view of the attorney or the judge. The question is whether the client would choose to hire other counsel if he or she is informed of the Judge's complaint against the attorney and if the attorney has violated his obligations to the client under Rule 1.4(b) by withholding this information and denying the client that choice. Comment [4] to Rule 1.4 states that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience." If the attorney does not disclose the Judge's complaint against him, he is arguably withholding the information to avoid the client discharging him and hiring alternative counsel who is not the subject of a Bar Counsel complaint by this Judge.

If the attorney does disclose the Bar Counsel complaint to the client, it violates the attorney's right to have that pending investigation remain confidential. Further, if the client discharges the attorney once the client learns of the Judge's Bar Counsel complaint (particularly on the eve of trial), opposing counsel and the opposing party will demand an explanation because it will delay the case while new counsel is hired and gets up to speed. That will further compromise the attorney's right to confidentiality concerning the Bar Counsel Complaint. If the client doesn't discharge the attorney, he or she could try to assert this conflict in a

later appeal challenging rulings the Judge makes against the client during the trial.

The attorney's third alternative in a situation where the trial court denies the motion to recuse is for the attorney to ask the trial court for a stay of that order while he files an *ex parte*, single justice petition under C. 231, sec. 118 to the Appeals Court seeking an interlocutory review and reversal of the denial of the motion to recuse. Any such interlocutory review will delay the trial and will be the subject of a motion to impound given the confidential nature of the Bar Counsel complaint at issue.

For all of the reasons above, I think we should ask the Court to consider specifically addressing the conflict that arises when a Judge discharges his/her obligations under the Canons by filing a Bar Counsel complaint or taking action under the new Rule 2.14."